

OLC 71-2052
3 December 1971

MEMORANDUM FOR THE RECORD

SUBJECT: Equal Employment Opportunity Enforcement
Act - S. 2515

1. Background:

a. Title VII of the Civil Rights Act of 1964 established the Equal Employment Opportunity Commission. At present, Federal employment is excluded from the operation of Title VII (section 701 (b)(1) and (f)).

b. The primary purpose of S. 2515 is to tighten up on the enforcement powers of the Commission, but it also contains a separate provision covering Federal employment. It is quite likely that S. 2515 will be approved by the 92nd Congress in some form.

2. Existing Law:

5 U.S.C. 7151 states the policy of the U.S. to insure equal employment opportunities for Federal employees without discrimination because of race, color, religion, sex, or national origin. This general provision of law and the more specific language of Executive Order No. 11478, "Equal Employment Opportunity in the Federal Government," apply to the Agency. Section 4 of the Executive Order provides for appeal from final agency action to the Civil Service Commission. Appeal to the courts is apparently available to an aggrieved although court review is not specified in either 5 U.S.C. 7151 or Executive Order 11478.

3. Proposed Law:

a. The proposed law provides the Civil Service Commission statutory authority for ordering remedies, such as back pay, reinstatement, hiring, and immediate promotion.

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b. It also directs Commission involvement in equal employment programs of executive agencies.

c. Finally, it provides a statutory basis for a civil action in the U. S. District Court against an agency head following final disposition of a case by either an agency or the Civil Service Commission.

4. Discussion:

a. The Federal employee provision in the House version of the proposed law was stricken on the House floor. However, it did not cover CIA employment as the provision applied solely to the competitive service.

b. The Senate version of the Federal employee provision (S. 2515, new section 717) applies to CIA and raises at least the following problems:

(1) The enforcement authority of the Civil Service Commission and the remedies available to the aggrieved through court action could conflict with the Director's authority to terminate employment under section 102(c) of the National Security Act of 1947. To the extent the newer authorities prevailed there would be a dilution of the Director's 102(c) authority.

(2) Proceedings on complaints before either the Civil Service Commission on appeal or the district courts may necessarily involve the disclosure of information on Agency "organization, functions, names, official titles, salaries, or numbers of personnel employed" in conflict with section 6 of the CIA Act of 1949 and the Director's responsibility to protect intelligence sources and methods.

(3) The remedies available to aggrieved employees or applicants could be used to harass the Agency and its functioning, with ramifications similar in substance, if not in scope, to those we have associated with the so-called Ervin bill on constitutional rights of Federal employees.

(4) There may be a legitimate operational need that the assignment of personnel by the Agency not be free from discrimination based on race, color, religion, sex or national origin.

c. House

The staff director of the House subcommittee having jurisdiction over the matter is sympathetic with our problem and feels we could line up support for our position among the members of the subcommittee, including Chairman Dent who no doubt would be on the conference committee appointed to iron out differences between the Senate and House versions of the bill.

Senate

The senior majority and minority staff members of the Senate subcommittee likewise appear to be sympathetic and have offered to recommend to Chairman Williams whatever floor amendment or legislative history we can work up with the Civil Service Commission's blessing and within the following constraints:

(1) CIA should not be exempted by name (this could lead to a run of similar requests from other executive agencies).

(2) The provision cannot be limited solely to the "competitive service" since this would exempt "excepted positions" other than CIA's which they feel should be covered. (The provision uses the language of the executive order in defining its application to executive agencies. The Civil Service Commission has apparently bought the Senate provision in a compromise to fend off the transfer of its present authority over equal employment to the Equal Employment Opportunity Commission. As a consequence, the provision is being explained as merely spelling out in statute what now exists in executive order. This is an oversimplification in view of the proposed enforcement authorities of the Civil Service Commission, and the easier and less costly access to the Federal courts.)

5. Options:

a. Propose a specific exemption for CIA. This is probably unacceptable to the Senate subcommittee staff and from the Agency's interest could be misconstrued to give credence to allegations such as Senator Ervin's that the Agency believes it is beyond the law.

b. Prepare an indirect but complete exemption such as:

(1) Restrict the application of the provision to the "competitive service." The provision would then have a narrower application than Executive Order 11478 and may be unacceptable to the Senate subcommittee staff and the Civil Service Commission. On the other hand, such limited application would be in line with:

(a) The application provision reported out by the House committee, and

(b) The application provision proposed by the Senate committee for the judicial and legislative branches.

(2) Exclude from the application of the provision personnel actions subject to an explicit statutory authority for terminating the employment of any Federal officer or employee in the interest of the United States "notwithstanding the provisions of any other law" (precedent for exempting security cases is found in 703 (g) of Title VII).

(3) Authorize the President to designate positions or agencies which would not be subject to the application of the provision.

c. Attempt to get something short of a full exemption such as:

(1) Assuring that any charge, investigation or proceedings before the Civil Service Commission cannot be made public and that nothing said or done during and as a part of such endeavors may be made public without the written consent of the parties, or used as evidence in subsequent proceedings (precedent for this is contained in 706(a) of Title VII); or

(2) Providing a basis for bona fide occupational exemption (precedent for this is in sec. 703(e)(1) of Title VII).

d. Do nothing on the basis that the foreseeable probable harm to the Agency is slight and, in any case, less harmful than adverse publicity which may result if our interest in being exempted becomes a public issue in the Congress.



Assistant Legislative Counsel

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Distribution:

Original - Subject
 1 - OGC
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ROUTING AND RECORD SHEET

SUBJECT: (Optional)

25X1A

FROM: [REDACTED]		EXTENSION	NO.
Acting Legislative Counsel		4151	OLC 71-2052
TO: (Officer designation, room number, and building)	DATE		DATE
	RECEIVED	FORWARDED	OFFICER'S INITIALS
1. Executive Director			L LM
2.			<i>Col White was briefed by GPC, JMM, LLM, 7 Jan 12</i>
3.			<i>Col White was briefed by GPC, JMM, LLM, 7 Jan 12</i>
4.			<i>- on 7 January and he gave go ahead -</i>
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COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)

The attached covers legislation which will be the first order of business for the Senate after it returns on 18 January. The legislation deals with nondiscrimination in Federal employment. It would give an alleged aggrieved Agency applicant or employee a right to file a civil action against the Director and could be viewed as subordinating the Director's 102(c) termination authority in such cases. The legislation also gives the Civil Service Commission overview, appeal and enforcement powers over Agency action in this field.

Representatives of DDS, OGC, IG, OP, and OLC have met on the paper, concur in its assessment, and recommend that we seek indirect, but complete, exemption from the legislation by:

- (a) excluding personnel who are subject to an explicit statutory authority for termination of employment in the interest of the United States; or (b) authorizing the President to exempt positions or agencies; or (c) excluding personnel who are subject to a security program pursuant to executive order or statute, in that order of preference.

Your concurrence is requested before proceeding further with the Civil Service Commission and the Senate Committee.

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ROUTING AND RECORD SHEET

SUBJECT: (Optional)

FROM: Office of Legislative Counsel
7 D 35 Hqs.

EXTENSION
6136

NO.
DATE
3 December 1971

TO: (Officer designation, room number, and building)

DATE

RECEIVED FORWARDER

OFFICER'S INITIALS

COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)

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The attached has been prepared as an aid for the formulation of a new position on S. 2515, Equal Employment Opportunity Enforcement Act. As you know by now, we will have difficulty in obtaining favorable action on our initial position i.e. limit the application of the Federal employee provision to the "competitive service."

We have been informed that the legislation will probably not be considered by the Senate this session but that the leadership has agreed to make it one of the first items of business when the second session of the 92nd Congress convenes in January.

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[REDACTED]

Assistant Legislative Counsel

cc: OGC [REDACTED] 25X1A
PERS (Fisher) [REDACTED] 25X1A
OIG [REDACTED]
*ADDS (Wattles)

*Would you like to convene a meeting on this?

LUM
Thawber
SAC